IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

AMERICAN SURETY COMPANY OF NEW YORK,
PLAINTIFF IN ERROR,
v.
FREDERICK N. PAULY,
RECEIVER.

No. 168.

In Error to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This was an action brought by Frederick N. Pauly, receiver of the California National Bank of San Diego, California, defendant in error, to recover from the American Surety Company, plaintiff in error, the sum of $15,000 claimed to be due from the latter under its bond or contract of guaranty whereby it agreed to make good and reimburse to the above bank any loss sustained by it by

reason of any act of fraud or dishonesty on the part of one George N. O'Brien, its cashier.

The bond is dated July 1, 1891, and is made between the plaintiff in error, called the company, George N. O'Brien, called the employee, and the California National Bank, called the employer (R. 11–16).

The obligation of the company, as declared by the bond, is as follows (R. 12):

" . . . The company shall, within three months next after notice, accompanied by satisfactory proof of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer of moneys, securities, or other personal property in the possession of the employee, or for the possession of which he is responsible, by any act of fraud, or dishonesty, on the part of the employee, in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal or retirement of the employee from the service of the employer. It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employer, shall be *prima facie* evidence thereof. Provided always, that the company shall not be liable, by virtue of this bond, for any mere error of judgment or injudicious exercise of discretion on the part of the employee in and about all or any matters, wherein he shall have been vested with discretion, either by instruction or rules and regulations of the employer. And it is expressly understood and agreed that the company shall in no way be held liable hereunder to make good any loss which may occur to the employer by reason of any act or thing done, or left undone, by the employee in obedience to or in pursuance of any direction, instruc-

tion or authorization conveyed to and received by him from the employer or its duly authorized officer in that behalf."

This obligation is subject to certain provisions or conditions declared to be part of the bond (R. 13, 14, 15). Among these provisions are the following:

[1] "That the company shall be notified in writing, at its office in the city of New York, of any act on the part of the employee, which *may involve* a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer.

[2] "That any claim made in respect of this bond shall be in writing, addressed to the company, as aforesaid, as soon as practicable after the discovery of any loss for which the company is responsible hereunder, and within six months after the expiration or cancellation of this bond as aforesaid. And upon the making of such claim this bond shall wholly cease and determine as regards any liability for any act or omission of the employee committed subsequent to the making of such claim, and shall be surrendered to the company on payment of such claim.

* * * * * * * *

[3] "That if the company shall so elect, this bond may be cancelled at any time by giving one month's notice to the employer, and refunding the premium paid, less a *pro rata* part thereof for the time said bond shall have been in force, remaining liable for all or any default covered by this bond, which may have been committed by the employee, up to the date of such determination, and discovered and notified to the company within the limit of time hereinbefore provided for.

[4] "That the employer shall, if required by the company, and as soon thereafter as it can reasonably be done, give all such aid and information as may be possible (at the cost and expense of the company), for the purpose of prosecuting and bringing the employee to justice, or for aiding the company in suing for and making effort to obtain

reimbursement by the employee or his estate, of any moneys which the company shall have paid or become liable to pay by virtue of this bond.

* * * * * * * *

[5] "That no one of the above conditions, or of the provisions contained in this bond, shall be deemed to have been waived by or on behalf of the said company, unless the waiver be clearly expressed in writing, over the signatures of its president and its secretary, and its seal thereto affixed." (R. 13, 14, 15.)

The California National Bank of San Diego was organized in 1888. In January, 1891, one J. W. Collins, who had been cashier from the organization of the bank, became its president, and one George N. O'Brien, who had been a clerk, was appointed cashier. On the application of the latter to the plaintiff in error the bond was given, the limit of liability being $15,000. (R. 12–14.)

On October 12, 1891, Collins, the president, was in New York and effected a loan from the Western National Bank of that city to the California Bank. The loan was made on the note of the California Bank for $20,000, and on the security of promissory notes belonging to the California Bank and amounting to $36,250. The proceeds of the loan were credited by the Western National Bank to the California Bank, and subsequently drawn out by the latter (R. 78–81). The loan was to the California Bank and not to Collins (R. 78–81). A proper record of this transaction upon the books of the California Bank would have been a credit of the amount to "bills payable" and a debit of the same to the Western National Bank. The actual entries were a debit to the Western National and a credit to Collins in his individual account and no credit to bills payable. The result of such entries was that the proceeds of the loan obtained on the credit of the California Bank and by pledge of its securities, and which

should have remained subject only to its disposal were left subject to the order of Collins by his personal check. On the 13th of October, 1891, O'Brien filled up in his own handwriting a deposit tag which represented that by telegraphic dispatch Collins had that day made a deposit in the California Bank of $20,000. (R. 78, 107, 108, 109, 204.)

On October 12, 1891, and the following day, similar transactions took place between Collins and the United States National Bank of New York, whereby commercial paper belonging to the California Bank were rediscounted for that bank by the United States National, and placed to the credit of the California Bank. On the latter day, by means of a similar false deposit tag, the transaction was falsely entered as in the case of the Western National, and the proceeds, amounting to $24,500, placed to the individual credit of Collins. (R. 81, 82, 107, 108, 109, 204.)

It thus appeared that as a result of O'Brien's acts in filling up the deposit tags with statements which were false in fact, Collins' account with the bank was increased in his favor in the amount of $44,500. There was also another item in the account of Collins for $500 obtained from the United States National in the same way, making in all $45,000 which appeared on the books of the California Bank to the credit of Collins. (R. 107, 109, 205.)

When the bank suspended payment there were standing to his credit only $11,420.90. This sum deducted from the $45,000 fraudulently credited would leave a loss to the bank of $33,579.10, for had it not been for the false credits his account would not have been sufficient to pay checks subsequently drawn upon it, and presumably they would not have been honored. (R. 325.)

The above statement is substantially that of the Court

of Appeals, and is based upon the verdict of the jury. As will be seen hereafter, the question that should have been tried was not whether O'Brien was in fact guilty of actual fraud or dishonesty, but whether his acts were of such a character as to require notice of them to be given to the company. He may have been entirely innocent of intentional wrongdoing, but the duty to notify was none the less mandatory.

There was also evidence that while before the date of the contract the account of Collins at all times showed a balance to his credit, he was, in fact, largely indebted to the bank by means of other similar false entries which O'Brien had caused to be made.

The Surety Company, at the time it made the contract which is the subject of this suit, made a similar one in the sum of $25,000 to indemnify the bank against the misconduct of Collins, the judgment on which latter contract is before this court for review—No. 169 at the present term.

The bank suspended payment on the 12th of November, 1891, and possession of its assets was taken by the examiner. On the 18th of December, 1891, Pauly, the defendant in error, was appointed and on the 29th of that month qualified as receiver, and took possession of the assets, books, and papers. (R. 139.)

The bank, notwithstanding the fact that it had notice of the false entries by means of the deposit tags, as above mentioned, wholly failed before its suspension to give the Surety Company the notice required by the above-quoted provision of the contract "of any *act* on the part of the employee which *may involve* a loss for which the company is responsible hereunder as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer."

The receiver likewise having, as he admits, knowledge of the acts of O'Brien, likewise failed to give such notice to the company until the 1st of July, 1892, when he submitted his proof of claim for loss (R. 201). At that time the above-mentioned acts of O'Brien, and other acts of similar character, were for the first time notified to the company.

At the trial a letter from the receiver to the Surety Company, undated, but the date of which is fixed by the reply of the company, as May 23, 1892 (R. 232, 233), was given in evidence, which letter was assumed by the Court of Appeals to be a compliance with the above provision (R. 326, 327), and was treated by the trial court as evidence of such compliance to be passed upon by the jury. (R. 188, 189.) The letter is here set out in order that the court may see how far it is or ever was intended to be such compliance:

"AMERICAN SURETY COMPANY,
"160 *Broadway, New York, N. Y.*

"DEAR SIR: I write to notify you that the California National Bank held a bond to the amount of $20,000.00 in its favor for the faithful performance of duties by J. W. Collins, its late president, also in favor for the faithful performance of duties by Geo. N. O'Brien, its cashier, for $15,000.00. I therefore notify you that a discovery of fraud has been made of sufficient amount to require the payment of those indemnity bonds to the undersigned receiver of the California National Bank.

"I therefore ask that you forward us the necessary blanks to make the claim or claims in proper form.

"Respectfully, yours,
"FREDERICK N. PAULY,
"*Receiver.*" (R. 232).

Here are no acts notified, nor is the letter anything more than the general assertion of loss and a request for blanks, so as to make claim for the loss in proper form.

It is proper here to state that on an examination of the record it will be found that the receiver, through ignorance or mistake, appears at no time to have recognized the duty of giving the notice required by the above provision, but to have supposed that the only notice to which the Surety Company was entitled was that conveyed by the claim for payment.

At the trial the question arose as to the proper construction of the provision of the contract requiring notice of "any act on the part of the employee that *may* involve loss," or, what is the same thing, *may* involve fraud or dishonesty.

In behalf of the Surety Company, it was contended that the duty to give such notice arose when any act of the employee known to the employer imported to any reasonable mind fraud or dishonesty, and hence *might involve* loss. On the contrary, it was contended on behalf of the receiver that the duty to notify did not arise until, on investigation, the employer had become "*satisfied*" or convinced that fraud or dishonesty actually existed, and that any degree of suspicion, no matter how well founded or well calculated to govern the action of a reasonable mind, did not give rise to the duty to notify. This question was determined by the trial court against the Surety Company (R. 187), and the determination of that court was sustained by the Circuit Court of Appeals, and is now here for review (R. 328, 329).

Another question determined by the trial court and affirmed on appeal was whether the above duty was discharged "as soon as practicable" was to be determined by the jury. The court under its construction of the duty left that question to the jury on the ground of a conflict of evidence. Under a different and what is submitted to be the correct construction of the contract the question

plainly belonged to the court, for there was absolutely no contradiction of evidence in respect of knowledge of acts which to any reasonable mind must have carried the strongest presumption of loss through fraud or dishonesty. Indeed, on this point, the evidence of the receiver himself is conclusive that he knew of acts that might involve loss through fraud or dishonesty, but waited for months without giving notice.

Although the duty of the receiver, as defined by the court, was made to depend on the discovery of acts of actual fraud or dishonesty, it was still necessary that he should give notice to the company "as soon as practicable" after discovery. No notice was in fact given of such acts until the claim of loss, dated June 24, 1892, and received by the company July 1, 1892, was made. (R. 204, 234, 235.) Under the evidence the question of "as soon as practicable" was ruled to belong to the jury and was remitted to them for decision, and without proper instructions or, indeed, any instructions at all. Such question, it is submitted, belonged to the court.

Another question ruled by the trial court against the company, and affirmed by the Court of Appeals, is as follows: The contract guarantees the fidelity of O'Brien "in connection with the duties of the office or position hereinbefore referred to [cashier] or the duties *to which in the employer's service* he may be subsequently appointed and occurring during the continuance of this bond, and discovered during said continuance or within six months thereafter, *and* within six months from the death or dismissal or retirement of the employee from the service of the employer." (R. 12.)

A subsequent provision requires that any claim of loss shall be made as soon as practicable after the discovery of the loss "and within six months after the ex-

piration or cancellation of this bond as aforesaid." This refers to the expiration of the bond as fixed by the above provision quoted at length—that is, by limitation or by death, dismissal, or retirement.

The duties of O'Brien as cashier ceased on the 12th of November, 1891, when the bank suspended, and was taken in charge by the examiner. On the 18th of December, 1891, the receiver was appointed, and on the 29th of the same month he qualified and dispossessed all the officers and employees of the bank. (R. 139.) He, thereupon, for his own purposes, employed O'Brien, in what capacity does not appear. (R. 139.) The claim of loss was not made until July 1, 1892—more than six months after the expiration of the contract.

The trial court contented itself with overruling the proposition that the claim of loss was not made in time. The Court of Appeals held that the employment of O'Brien by the receiver was in law the equivalent of his appointment by the bank to other duties in its service. (R. 329.)

At the trial it was in evidence that the bond was obtained from the company by misrepresentations on the part of Collins, acting as president of the bank, as to the integrity of O'Brien, and that at the time Collins knew of previous acts on the part of O'Brien and for the benefit of Collins, similar to those involved in the present suit. The said misrepresentations and knowledge were excluded from the consideration of the jury by the trial judge, and his ruling was affirmed. (R. 191, 332). Other rulings were made at the trial, and afterwards affirmed, principally to the admission and rejection of evidence.

These, so far as here insisted on, will appear in the assignment of errors.

The complaint of the receiver contained other items

than those above mentioned (R. 6), but by the ruling of the court the area of controversy was limited to the claim in respect of the transactions of the 12th and 13th of October, 1891. (R. 174.)

Verdict and judgment for the plaintiff. (R. 200, 48.) Affirmed on appeal. (R. 336.)

The bill of exceptions contains all the evidence. (R. 281.)

ASSIGNMENT OF ERRORS.

There was error—

1. In the refusal to charge that by the true construction of the contract it was the duty of the bank or receiver to notify the Surety Company of any act on the part of O'Brien, which, reasonably considered, *might* involve fraud or dishonesty in his office as soon as practicable after such act came to the knowledge of the bank or receiver (R. 132, 133, 173; Requests Nos. 8, 9, 10, 11, and 12, overruled, and exception; R. 175, 176, 197), and, on the contrary, in charging as follows:

"The defendant was entitled to notice in writing of any act of the cashier which came to the knowledge of the plaintiff of a fraudulent or dishonest character as soon as practicable after the plaintiff acquired knowledge. It is not sufficient to defeat the plaintiff's right of action upon the policy that it be shown that the plaintiff may have had suspicions of dishonest conduct of the cashier, but it was the plaintiff's duty under the policy, when it came to his knowledge—when he was satisfied that the cashier had committed acts of dishonesty or fraud likely to involve loss to the defendant under the bond—as soon as was practicable thereafter, to give

written notice to the defendant, * * * and in considering this you are to inquire, first, when it was that the plaintiff *became satisfied* that the cashier had committed dishonest or fraudulent acts which might render the defendant liable under this policy. He may have had suspicions of irregularities, he may have had suspicions of fraud, but he was not bound to act *until he had acquired knowledge of some specific fraudulent or dishonest act which might involve the defendant in liability for the misconduct.*" (R. 187; exception at R. 197.)

2. In refusing to rule that, whatever the predicate of the duty to notify, whether as ruled by the court or claimed in behalf of the company, the company under the evidence was not, as matter of law, "notified as soon as practicable of acts which might involve a loss as provided by the bond," and in submitting that question to the jury for determination. Motion to direct verdict on same grounds as motion to nonsuit. (R. 173, 132.)

3. In refusing to give the following instructions to enable the jury to decide the question of "as soon as practicable," as requested in behalf of the company:

"If the jury find upon the evidence that on or before the first day of February, 1892, Mr. Pauly knew of any act of O'Brien which *might* involve a loss to the Surety Company under the bond in suit, then they must find a verdict for the Surety Company. (R. 175; exception at R. 197.)

"If the jury find upon the evidence that on or before the first day of March, 1892, Mr. Pauly knew of any act of O'Brien which *might* involve a loss to the Surety Company under said bond in suit, then they must find a verdict for the Surety Company. (R. 175; exception at R. 197.)

"If the jury find upon the evidence that on or before the first day of April, 1882, Mr. Pauly knew of

any act of O'Brien which *might* involve a loss to the Surety Company, under the bond in suit, then they must find a verdict for the Surety Company. (R. 175; exception at R. 197.)

"If the jury find upon the evidence that on or before the first day of May, 1892, Mr. Pauly knew of any act of O'Brien which *might* involve a loss to the Surety Company, under the bond in suit, then they must find a verdict for the Surety Company." (R. 176; exception at R. 197.)

4. In ruling that in determining the question of whether the above notice was given as soon as practicable, the jury might consider that the receiver was engaged "more or less" in consultation with the United States attorney, and with the criminal authorities, and that his circumstances and situation did not reasonably admit of an earlier notice. (R. 190, 191; exception, R. 197.)

5. In refusing to direct a verdict for the company on the ground that the receiver had not shown "that a proof of claim was made as soon as practicable after the discovery of the loss, nor within six months after the expiration or cancellation of the bond." (R. 173, 132, first ground.)

6. In submitting to the jury the question whether the claim of loss was made as soon as practicable, and in that connection in charging:

"Now this notice (of claim) was given, the only way it could be given practically, by mail on the 24th of June, and received by the defendant on the 1st of July. Now, if it is a fact that the plaintiff was engaged more or less in consultation with the United States attorney, and with the criminal authorities, and that his circumstances and situation were such that it could not be reasonably expected of

him that he should make out this formal claim and send it before the time when he did so, then you can find the notice was given within a reasonable time and in compliance with the condition of the policy." (R. 190, 191; exception at R. 197.)

7. In charging that—

"It is said that this bond of indemnity was obtained upon an application which was certified to by the bank itself, and that in the application facts were misrepresented and facts were concealed with fraudulent intent on the part of the bank, therefore, that the bond is void. * * * The only knowledge of any facts which ought to have been communicated or were misrepresented—the only knowledge which the bank possessed at the time that application was made—was the knowledge of Collins himself. Ordinarily, a corporation, like any other principal, is chargeable with the knowledge of any facts which are known to its agents; but in this case, all these transactions, if there were any transactions of a fraudulent and dishonest character on the part of the cashier, were transactions for the benefit of Collins, and he was a participator in the fraud, and, under those circumstances, the law does not infer that the agent or the officer will communicate the fact to its principal, the corporation, and, under such circumstances, the corporation is not bound by his knowledge, so this defense melts away, and there is nothing of it whatever." (R. 191, 192; exception at R. 197.)

8. In refusing to charge as follows:

"The books and papers of the bank are not of themselves, nor are any entries therein, binding upon this defendant or evidence against it, and the jury must not accept as evidence any entries therein unless established by the testimony of some witness having personal knowledge of the transaction to which the entry relates, and establishing such transaction by means of such knowledge." (R. 178; exception at R. 197.)

9. In the improper admission of evidence against the objection of the counsel of the company, as follows:

a. During the examination of Chas. L. Brimhall, a witness for plaintiff, after the witness had testified that the account of Mr. Collins was on page 120 of Ledger 4, and as to the manner of keeping said account, said judge erroneously permitted plaintiff's counsel to put said account in evidence. (R. 51.)

b. During the examination of said Brimhall, after the witness had testified that certain entries in the teller's book of the California National Bank were in the handwriting of Mr. Gregg, said judge erroneously permitted plaintiff's counsel to put the said book in evidence as plaintiff's Exhibit "M." (R. 61, Exhibit "M," R. 206.)

c. During the redirect examination of said Brimhall said judge erroneously permitted plaintiff's counsel to put in evidence as plaintiff's Exhibit "W" a certain deposit slip for $25,000, dated March 3, 1891. (R. 74, Exhibit "W," R. 213.)

d. During the redirect examination of said Brimhall said judge erroneously permitted plaintiff's counsel to put in evidence as plaintiff's Exhibit "X" a certain deposit slip for $20,000, dated June 6, 1891. (R. 74, Exhibit "X," R. 213.)

e. During the examination of George S. Hickok, a witness for plaintiff, said judge erroneously permitted plaintiff's counsel to ask the witness, "Will you state what the transaction was?" (R. 75.)

f. During the examination of said Hickok said judge erroneously permitted plaintiff's counsel to put in evidence as plaintiff's Exhibit "AA" a certain note for $25,000, dated April 1, 1891. (R. 76, Exhibit "AA," R. 214.)

g. During the examination of said Hickok said judge

erroneously permitted plaintiff's counsel to ask the witness, "What was the transaction?" (R. 76.)

h. During the examination of said Hickok said judge erroneously permitted plaintiff's counsel to put in evidence as plaintiff's Exhibit "BB" a certain note for $20,000, dated June 3, 1891. (R. 77, Exhibit "BB," R. 215.)

i. During the examination of said Brimhall the court erroneously admitted in evidence a deposit slip of May 2, 1891, antedating the bond for $40,000, which was in the handwriting of one Harry E. O'Brien (R. 74) a clerk in the employment of the bank. (R. 75.)

10. In denying at the close of the evidence the motion of the defendant to direct a verdict for the defendant. (R. 173.)

11. In refusing to charge the jury, as requested, that "There can be no recovery in this action upon any item of claim made at this trial unless a claim in regard to such item was set forth in the proof of claim served upon the defendant in July, 1892, nor unless such item of claim has been proved upon this trial as it was set forth in said proof of claim." (R. 176, 177; exception at R. 197.)

12. In refusing to charge, as requested, that "Even if the jury find that the credits of $25,000 and $20,000, for which the plaintiff seeks to recover, were fraudulent and dishonest to the knowledge of O'Brien, that alone does not make out the plaintiff's claim. He must show that a loss resulted from these credits, and in considering this latter question the jury must not regard the alleged earlier false credits that have been given in evidence. These earlier credits have no legitimate bearing upon this question of loss from the latter ones." (R. 177; exception at R. 197.)

13. The trial judge, after the charge, and in reply to the following question by a juror: "If they [meaning the plaintiff] found out the fraud on the 2d day of March and notified them on the 23d day of May, would that be, in law, a notice as soon as practicable?" erroneously replied: "No; I should charge, in reference to that, that that is a question for you to determine; it is a question of fact, and not a question of law." (R. 192.)

14. The Court of Appeals erred in affirming the judgment of the circuit court. (R. 336.)

POINTS AND ARGUMENT.

POINT I.

THE DUTY TO NOTIFY THE SURETY COMPANY AS SOON AS PRACTICABLE OF ANY ACT WHICH MAY INVOLVE LOSS.

Both courts below held that the duty to notify was mandatory, and a condition precedent, failure to comply with which was fatal to recovery.

Both courts also held that the receiver succeeding to the obligation of the company took it *cum onere*, and was bound by the condition to notify.

These matters out of the way, it is proposed, briefly, to discuss, first, the *duty*, and, secondly, *whether it arose and was discharged*.

1. *The Duty.*

This is plainly a matter of construction. The parties have made their contract, and the only question is what it means. It will be borne in mind that the contract re-

lated exclusively to the relation of master and servant, employer and employee, the company undertaking to guaranty the fidelity of the cashier subject to the conditions of the contract.

In the case of such a guaranty there is at common law and wholly apart from contract, a duty on the part of the employer to notify the guarantor of the fraud or dishonesty of the employee. The employer, having the power of dismissal, cannot retain in his service at the risk of the guarantor an employee whose want of integrity the employer has discovered, or has reasonable ground to believe.

Phillips *v.* Foxall, L. R., 7 Q. B. 666.
Sanderson *v.* Aston, L. R., 8 Exch. 73.
Byrne *v.* Muzio, L. R. Irish (8 Q. B. C. P. & Ex.), 396.
Roberts *v.* Donovan, 70 Cal. 107.
Conn. Mut. Life Ins. Co. *v.* Scott, 81 Ky. 540.
Watertown Fire Ins. Co. *v.* Simmons, 131 Mass. 85.
Atlantic & Pac. Tel. Co. *v.* Barnes, 64 N. Y. 385.
McKecknie *v.* Ward, 58 N. Y. 541.

The principle finding expression in the above cases—that is, that there is some duty, not always clearly defined, due from the employer to the guarantor after the discovery of misconduct by the employee—lies at the foundation of the present contract. The parties competent to contract have undertaken to declare in plain words the duty and its limitations. The bank has said in terms: "I will notify you of any act on the part of my cashier which may involve a loss to you under your contract as soon as practicable after the occurrence of such act shall have come to my knowledge;" and the receiver has said the same thing.

The thing to be notified is the act—any act that *may* involve loss, not any act that *must* involve such loss.

The duty depends exclusively upon the character of the act. It must be an act that may involve loss. As none but fraud or dishonesty under the contract could involve loss, the act must be such as may involve fraud or dishonesty. The act need not be in itself fraud or dishonesty; it is sufficient if it may involve fraud or dishonesty. In the present case the act was, on its face, fraudulent and dishonest as both the lower courts have held.

What is the act or acts? It is in brief the act of a cashier directing the transfer of the money of the bank to a party who has no right to it and falsifying transactions by false entries.

Is such an act one that *may* involve fraud or dishonesty? It seems there can be but one answer.

Of course, an act carrying on its face fraud and dishonesty, and hence loss, may not be in fact what it appears to be. That, however, is not the question, but, on the contrary, the question is whether the act *may* be what it imports to be on its face, and hence may involve loss. The duty depends upon the inherent character of the act presented to the mind of the employer and the natural and ordinary consequences of the act and how far in common experience it is consistent with the integrity of the employee.

The theory of the courts below is that while the act imported fraud or dishonesty and the employer knew of such act, yet there was no duty to notify until the employer was "*satisfied*" by investigation that it was in fact an act of fraud or dishonesty which might involve loss. But this is not the contract. The contract says that any act that may involve fraud or dishonesty shall be notified as soon as practicable, not that it shall be investigated and notified or not according to the conclusion reached by the employer. The Surety Company contracted for

notice of the act itself, not for its trial and determination by the employer and notice of his conclusion.

It is submitted, with great deference, that the construction of the courts below is not only violative of the terms of the contract, but also of the manifest intention and object of the parties to it.

The provision is for the benefit of the company. It is one of the conditions upon which it undertook to guaranty, and its construction as here contended for, while imposing no hardship upon the employer, secures only a reasonable degree of protection to the company. It is a common provision in contracts of this description.

By the third provision of the contract, above quoted, the company has the election to cancel its bond on the terms prescribed by giving one month's notice to the employer, and by the further provision, above quoted, the employer is bound, if required by the company, to give such aid and information as may be possible for the purpose of bringing the employee to justice and of aiding the company in any effort to obtain reimbursement of any moneys which the company shall have paid or become liable to pay under the bond. Now, it is asked, of what avail are these provisions if the company is to be kept in ignorance of acts of the employee which may involve loss until the employer shall, by investigation, reach the state of "satisfaction" required by the rulings below? The two provisions of the contract last mentioned are in entire harmony with the first, and the three taken together show that to the extent of *preventing* loss, if practicable, and of obtaining indemnity the employer was, upon the discovery of acts that might involve loss, to co-operate with the guarantor by giving the notice required by the first provision and thereby enabling the exercise of the election and the recovery of the loss, as required by the third and fourth provisions.

The manifest object of requiring any act that may involve loss to be promptly notified to the company is to enable it to act with dispatch for its own protection.

The first provision is wholly different from the second. The latter relates to the claim for payment for loss, to be made as soon as practicable after *the discovery of the loss*. It was proper for the receiver, and, indeed, was his duty, to pursue his investigation so as to ascertain the loss for which the claim was to be made. He could not otherwise make the claim. His duty in this respect was essentially different from his duty under the first provision. The latter was a duty to the surety company, the former to the bank. The former related to the actual loss which had been sustained, the latter to an act which might involve loss, whether or not the loss had been actually sustained or not.

The effect of the decision below was substantially to expunge the first provision from the contract. The only right to notice accorded to the company was notice of actual loss. Its right to notice of any act that might involve loss was utterly obliterated. In the present case two notices were plainly required: first, notice of the discovered act that might involve loss, and, secondly, notice of the loss actually sustained—that is the claim of loss. This subject was distinctly brought to the attention of the trial court by the counsel of the company, but the court ruled that two notices were not required by the contract, and an exception was taken to that ruling. (R. 133.)

It is not meant to assert that two notices in form are always necessary. Cases may perhaps be imagined where the claim of loss is made so soon after the discovery of an act that may involve loss as to make the notice conveyed by the claim a sufficient compliance with both provisions, but the case under consideration is not one of that kind.

In the charge of the court pains are taken to impress upon the jury the difference between "knowledge" and "suspicion." In the opinion of the Court of Appeals extracts from the charge are given, and then the court says:

"The exception is unsound. The charge carefully conforms to the requirements of the bond. 'Knowledge' and 'suspicion' are not synonymous terms. The bond calls for no notice of suspicions, but only for *any act* on the part of the employee which may involve loss, as soon after the occurrence *of such act shall come to the knowledge of the employer.*" (R. 328.)

The court is in error in asserting that it was ever claimed in behalf of the company that mere suspicion was sufficient to call into action the duty prescribed by the first provision of the contract.

The exception referred to is at pages 195 and 196 of the record. While it is directed in part to what was said in the charge in various forms as to suspicion, as well it might be, its main purpose was to except to the part of the charge wherein it was declared that the receiver was not bound to give the preliminary notice, as it was called, until he became satisfied that O'Brien had actually committed acts of fraud or dishonesty—that is, that the proper construction of the contract was that the company was only entitled to be notified after the question of fraud or dishonesty had been *tried and determined* by the receiver, and not when acts had been presented to him which any reasonable mind would declare might involve fraud or dishonesty.

There are many degrees of suspicion, and all of them are, of course, short of absolute knowledge. The duty of the receiver, it is conceded, did not depend upon his suspicion in the narrow sense of that word. He was not called on to infer or imagine guilt from slight evidence or no

evidence at all. On the other hand, however, he was bound to exercise that degree of judgment which any man of reasonable mind would exercise upon the act or acts which came to his knowledge, and if such act or acts, reasonably considered, might involve fraud or dishonesty, he was bound to notify the company. The standard of duty was what the act or acts fairly and reasonably imported to a reasonable mind. Such a standard of duty is universally accepted in human affairs, and the gravest responsibilities, criminal and civil, depend upon its application.

It is submitted that this standard of duty should have been given to the jury instead of the two antipodes of "suspicion" and "satisfaction." It is remarkable that the Court of Appeals, while approving the charge as to "suspicion," had not a word to say in regard to "satisfaction."

2. *Did the duty arise and was it discharged?*

These questions have yet to be tried. The questions already tried are in respect of the duty as erroneously defined—that is, the duty to notify after the receiver, upon investigation, becomes satisfied of actual fraud or dishonesty.

The questions to be tried under a proper definition of the duty are whether the company was notified of any act or acts of O'Brien that, reasonably considered, *might* involve fraud or dishonesty, as soon as practicable after such act or acts came to the knowledge of the bank or receiver.

The consideration of the latter questions in advance of a trial would be premature. It is plain that they are essentially different from those which have been tried. It may not be amiss, however, to call attention to some of

the evidences of knowledge of acts that might involve fraud or dishonesty, as disclosed by the present record.

a. Did the Duty arise?

The entries on the tags and in the books were false on their face. The Court of Appeals says the entries on the tags were "manifestly false" (R. 326), and the entries on the books followed those on the tags. Then had not the bank knowledge, in the sense in which that word is used in contracts like the present, and, indeed, in which it has been applied to the evidence by both courts, of acts that might involve fraud or dishonesty? The Court of Appeals says the false entries did not *per se prove* fraud or dishonesty, but that O'Brien might have acted ignorantly or negligently. (R. 326.) That may be so, but did not the false tags and entries involve fraud or dishonesty until explained, and hence was it not the duty of the bank to notify the company? Both courts below seem to assume that nothing short of evidence sufficient to convict O'Brien could call into activity the duty to notify the company. But O'Brien was not on trial, and the predicate of the duty of the bank to the company was very far from the predicate of the conviction of O'Brien. The bank then had knowledge, not of the actual guilt, but of acts that might reasonably involve guilt, and yet the bank failed to notify the company.

The same acts that might involve guilt known to the bank were also known to the receiver.

He was examined as a witness. It is proper to say that according to his conception of his duty, it did not extend beyond the duty to notify the company until he had become "satisfied" or convinced of actual fraud or dishonesty, and hence loss. This is perfectly manifest.

He did not recognize the duty under discussion and made no attempt to discharge it. As thus enlightened, his evidence on this point is here set out:

"Q. When did you make, if ever, any examination by yourself or employees of the account of J. W. Collins with the bank?

A. I think my examination began early in 1892, January or February; I think January. (R. 137.)

Q. Well, how was that examination prosecuted and what time did it take?

A. I had an expert bookkeeper employed for a period of three months. (R. 137.)

Q. Did you or not find any errors or irregularities in the account of J. W. Collins with the bank?

A. The bookkeeper found them. (R. 137.)

Q. When or about what time?

A. That was some time in the first three months of the year—January, February or March. I think I became aware in January that there were irregularities in the account. (R. 137.)

Q. Well, when did you discover the amounts and special conditions, if any, of such irregularities?

A. Well, I should suppose that would probably date from the time of the completion of the examination of the expert bookkeeper; just when I don't know; that may be ascertained from the books. (R. 137.)

Q. Did you or not become aware of any real irregularities or loss to the bank through J. W. Collins, and if so, state what you did about it?

A. When I became aware that they were——

Q. (Interrupting.) The question is, did you become aware?

A. Yes, sir; I became aware that there were irregularities in Mr. Collins' account and that the bank had suffered loss from his defalcation. (R. 137.)

Q. Then what did you do about it?

A. When I became aware of it I made it known to the American Surety Company that I had discovered evidences of fraud on the part of J. W. Collins. (R. 137.)

Q. Well, how long after you became aware of them?

A. How long after I became aware of them?

Q. Yes.

A. I can't state that exactly; it may have been two months. (R. 138.)

Q. Well, why did you wait two months before giving information to the American Surety Company about these losses?

A. Because of the extensive business I had on hand and the many matters that were calling for attention every day. (R. 138.)

Q. Well, did you have to carry on or not any consultations concerning these losses?

A. Yes; I consulted my attorney. (R. 138.)

Q. When did you commence your examination of the affairs of the bank?

A. I presume immediately after I took possession, I might be said to have commenced my examination, as I did. (R. 140.) [He took possession on the 29th of December, 1891.]

Q. And how soon after your appointment was it that you were advised or were led to believe that there was a shortage in the account of Mr. Collins?

A. I cannot answer that with any definiteness; I think within the first two weeks, probably, I was aware of some irregularities. (R. 141.)

Q. You say you became aware of irregularities. Do you state that of your own knowledge that you know there were irregularities?

A. No, not then. (R. 141.)

Q. Do you mean somebody informed you?

A. Yes; I mean some information was dropped. (R. 141.)

Q. And in your testimony that you have given here, on this examination, when you speak of having become aware of irregularities, do you mean you knew of your own knowledge that there were irregularities?

A. Well, now that depends; I am certainly convinced now, if you talk about now, that there were irregularities; if you ask me about that time, then I will say the informa-

tion came to me from other sources, and I had my suspicions awakened. (R. 141.)

Q. Now you say you are convinced of irregularities?

A. Yes. (R. 141.)

Q. Does not that arise from information given you by others, and obtained, possibly, from books of the bank?

A. It does. (R. 141.)

Q. You had no knowledge of the transactions themselves in the first instance?

A. I had not. (R. 141.)

Q. You have no knowledge now of the transactions?

A. No, except as they come from the books. (R. 141.)

Q. So your conviction arises simply from information from books and papers in the bank or given you by others?

A. That is true. (R. 141.)

Q. I understand you to say that early in the year 1892 you presented the matters involved in the alleged acts of Mr. Collins and Mr. O'Brien to the district attorney of the southern district of California; can you give us the precise time when you did so consult the district attorney on the subject?

A. Not from memory. (R. 143.)

Q. About what time was it?

A. I think about some time in January, or, possibly, in February. (R. 143.)

Q. Did you go before the grand jury of the United States for the southern district of California and present complaints against Mr. Collins and Mr. O'Brien?

A. No, sir. (R. 143.)

Q. Did the district attorney present complaints against Mr. Collins and Mr. O'Brien, based on the information you had given him?

A. Not before the grand jury. (R. 143.)

Q. Your accent on the words "grand jury" leads me to ask whether it wasn't some other jury that you presented that to?

A. No, it was not presented before another jury. (R. 143.)

Q. To whom were the complaints peesented?

A. Before a commissioner as to Mr. Collins.

Q. And to whom were they presented in relation to Mr. O'Brien?

A. Before the grand jury. (R. 143.)

Q. Was an indictment found against Mr. Collins?

A. Yes, sir; let me see; the complaint was sworn out against him; but whether it got to an indictment I am not sure. (R. 143.)

Q. About when was the complaint sworn to?

A. I should think about the middle of February. (R. 143.)

Q. When did you first have knowledge of the particular acts of fraud or mismanagement which may or may not have occasioned loss to the California bank?

A. I cannot fix that date to any certainty. I suppose it was some time in the fore part of 1892, probably February or March; it must have been February, because Mr. Collins was arrested. I don't remember the period exactly." (R. 163.) [Collins died 3d March, 1892. (R. 123.)]

In the proof of claim, sworn to by the receiver on the 24th of June, 1892, he used this conclusive language:

"That heretofore, on the 18th of December, A. D. one thousand eight hundred and ninety-one, he was, by the Hon. E. S. Lacy, Comptroller of the Currency of the United States, appointed receiver of the California National Bank of San Diego. * * *

"That immediately after his appointment as such receiver being advised that George L. O'Brien, the then cashier of said association, was thought and believed to have issued certificates of deposit without authority, and to have made false entries upon the books of the bank; and to have been guilty of fraudulent conduct in connection with discharge of his duties as such cashier, . . ." (R. 201.)

Other evidence on this point might be here referred to, but it does not seem necessary.

What is, in substance, his evidence? He does not deny knowledge of the entries on the tags and books in his possession, nor that such entries, to his mind, might involve fraud or dishonesty. He became aware of what he mildly terms "irregularities" in January, 1892, having commenced an examination of the affairs of the bank immediately after he took possession (December 29, 1891). In February he knew of particular acts of fraud that might have caused loss. His sense of duty prompted him to lay the matters involved in the acts of Collins and O'Brien before the district attorney (Rec. 143) (who was also his private counsel, R. 167), and the result was the arrest in February of Collins, and a complaint being presented to the grand jury in the same month, sworn to by, or based on the information given by, the receiver. (R. 143.) The same sense of duty led him to employ experts to examine the books of the bank so as to ascertain the extent of the loss.

Now, it may be safely asserted, what had come to his knowledge and was sufficient to impel him to invade the personal rights of his fellow-men and to enter upon the long investigation of the books, were sufficient to require him to notify the company of acts that might involve loss. So much as to whether the duty arose.

b. Was it discharged?

It was not, nor was there any effort to discharge it. It is true that the trial court assumed that the letter of May 23, 1892 (Rec. 232), was such a notice as the duty required, but it is only necessary to read the letter to be satisfied that it related in no sense to the duty under discussion. It was a general notice of loss claimed on ac-

count of actual fraud, a notice common in policies of insurance, but having no place in the present contract. The letter says "that a discovery of fraud has been made of sufficient amount to require the payment of these indemnity bonds," etc., and requests that blanks be forwarded to enable the claim or claims to be made in proper form. It does not relate to future loss, or any act or acts that may involve it.

As the court construed the contract, the employee was under no obligation to notify the company, save after the discovery of actual fraud or dishonesty involving loss. Under that construction the letter might be a notice of actual fraud and consequent loss, but not even then, in the language of the charge, of "acts of dishonesty or fraud *likely* to involve loss to the defendant," or "of some specific fraudulent or dishonest act which *might* involve the defendant in liability for the misconduct." (R. 187.)

As stated above, it is manifest from the evidence that by the receiver's construction of the contract, it was not incumbent upon him to give any notice to the company, save the claim of loss under the second provision of the bond to be made after the discovery of actual fraud or dishonesty and the loss thereby; and he acted on that theory throughout. His construction simply obliterated the first provision.

What has been said at perhaps unpardonable length will, it is hoped, satisfy this court that if the definition of "duty" here insisted on be correct, then the judgments below were a great wrong to the plaintiff in error.

POINT II.

ASSUMING THAT THE DUTY OF THE RECEIVER WAS AS DEFINED BY THE TRIAL COURT TO NOTIFY THE SURETY COMPANY OF ACTS OF FRAUD OR DISHONESTY WHICH MIGHT INVOLVE LOSS AS SOON AS PRACTICABLE AFTER HE BECAME "SATISFIED" THAT SUCH ACTS HAD BEEN COMMITTED, THE DUTY WAS NOT DISCHARGED.

No notice was given until July 1, 1892, when the claim for loss dated June 24, 1892, was received. The purpose of the notice was to enable the company to protect itself against the acts required to be notified. It surely cannot be contended that the letter of May 23, 1892, stating no acts, was a fulfilment of the duty even under the construction of the court. In this connection the attention of the court is called to the evidence of the receiver set out under our first point. While in respect of the claim of loss, accompanied by proofs of acts of misconduct and the amount of pecuniary loss, there might be some excuse for delay, can any be imagined with regard to the acts themselves?

The burden of proof was on the plaintiff below to show he had given the notice as soon as practicable, and it is submitted that, as matter of law, the duty was not discharged.

The evidence was that the receiver had discovered acts of fraud or dishonesty which might involve loss in January, February, and March.

In the bill of particulars offered in evidence by the defendant below (R. 136), he states that he took possession as receiver December 29, 1891, and that the acts of "fraud

and dishonesty" mentioned in the complaint were discovered *during February and March*, 1892. (R. 34.)

He testifies that *within two weeks* after his *appointment*—which was December 18, 1891—he was "aware of some irregularities" in Collins's account (R. 141); that he "completed his examination" *in two or three weeks* (R. 164); that it may have been *two months* after he became aware of Collins's fraud before he informed the Surety Company (R. 138); that some time in January or February he presented the matters involved in the acts of Collins and O'Brien to the district attorney; and that the district attorney presented criminal complaints against Collins and O'Brien, either sworn to by the receiver or *based on the information he had given*, and that the complaint was sworn to against Collins about the middle of February (R. 143); and that it *must have been in February* when he first had knowledge of the *particular acts of fraud or mismanagement which occasioned loss to the bank, because Collins was arrested* (R. 163), and Collins died March 3, 1892. (R. 123.) He testifies that in the first instance he rejected all claims made against the Bank, *involving items included in his claim against the Surety Company.* (R. 163.)

The Western National's proof of claim is dated *March* 5, 1892 (R. 219–222), and was sent to the receiver at that time. (R. 79.) It was rejected by a letter dated March 28, 1892. (R. 314.)

The receiver made a report to the Comptroller, dated *January* 27, 1892, in which he mentioned (among others) the $20,000 Western National Bank item (R. 145), which he afterwards rejected when presented as claims.

The situation, in brief, then, is this:

Dec. 18, 1891, appointment of receiver.

Dec. 29, 1891, the receiver took possession.

In January or February, 1892, he swore to complaints against Collins and O'Brien.

January 27, 1892, he included in his report to the Comptroller some of the very items now sued on.

In March he rejected the Western National Bank item sued on.

He *expressly says* that in *February or March*, 1892, he "*discovered*" the *very acts relied on in the complaint.*

He makes like statements again and again.

June 24, 1892, he writes his notice, and verifies his proof of loss. (R. 204, 235, 237.)

Upon these conceded facts had the receiver a right to wait *until the end of June* before notifying the company, when the surety expressly stipulated that it should have notice of acts which might involve loss as soon as practicable after discovery?

The receiver, to break the force of the testimony already referred to, put on the stand Bloodgood, an assistant of Sparks, the latter being the expert employed to investigate the books, omitting to call Sparks himself, from whom he had learned of some of the acts (R. 97, 142), although Sparks still lives in San Diego. (R. 123, 141.)

He then sought to prove by Bloodgood, *when Bloodgood himself* discovered the loss. To this it was objected that it was of no consequence when Bloodgood discovered it, and that the question also called for his conclusion as to what constituted a discovery, but the answer was admitted over our exception. (R. 98.) Of what avail was this to the plaintiff? Having sworn explicitly that he (plaintiff) discovered the loss in February or March, and it appearing also by the facts in detail that this was the true date, what difference did it make when some one else discovered it?

It may not be amiss, however, simply to call attention

to the testimony, as showing when Bloodgood himself really discovered it. He reveals the fact that the bank examiner gave to the receiver a "statement" showing what corrections ought to have been made in the books, and that he (Bloodgood) then "checked up" that statement. (R. 118.) This was in January. (R. 118.) Among others, he "checked up" the U. S. National Bank item of $25,000—one of the very items afterwards sued on—looking especially to see whether any of those amounts were credited to Collins's account. He also examined as to certificates of deposit. And he actually "found out" that Collins had been credited with three of the items in suit. (R. 119.) There was not much search needed after all, for the bank examiner himself had expressly written: "Charge Collins and credit U. S. National Bank." (R. 120.) Bloodgood did not know, he says, that this was "fraud or dishonesty" till the U. S. district attorney told him so, and he tries to put this in May. (R. 121.) But complaints were sworn out against Collins and O'Brien in February (R. 143), and Collins died on March 3, 1892. (R. 123.) And the receiver, on January 27, 1892, made his report to the Comptroller, including three items now sued on (R. 145), two of them being certificates of deposit signed by O'Brien. (R. 61, 62.)

If, then, it were possible to raise an issue of fact as to the time when *the receiver* made a certain discovery, by setting against his own repeated statements of this time—Bloodgood's statement—when he (Bloodgood) discovered it, does Bloodgood's own testimony show that the discovery was made at any different time from that stated by the receiver?

We shall offer but little more upon this branch of the case. It deserves mention perhaps that at the outset a motion was made to dismiss the complaint upon the show-

ing of dates made by the complaint and the bill of particulars. (R. 47.) The court ruled in our favor. Thereupon the receiver amended by changing these dates. (R. 48.) Of course the old statement was still competent evidence, and we introduced it as such. (R. 136.) While the *pleadings* were changed the final state of the *evidence* supported the original state of the pleadings, and the same ruling, we submit, should have been made when the same question was again presented.

Attention should here be called to the amended bill of particulars, filed during the trial, in which the receiver states that he discovered the acts of fraud and dishonesty referred to in paragraph 9 of the complaint between the 1st and 23d of May, 1892. The acts referred to in that paragraph are the acts of dishonesty or fraud which actually had involved loss. We are discussing here when those acts of fraud or dishonesty which might involve loss came to the knowledge of the receiver. Besides, even if the bill of particulars had been so amended as to apply to the acts of fraud or dishonesty, which might involve loss, the bill is not evidence. It is only a sworn statement of what the plaintiff below expects to prove, and its office is only to limit and restrict the trial and the recovery.

It seems so incredible that the surety's rights in this case should have been disregarded, as we have seen that they were, as to make it worth while to point out the possible explanation of the mystery. The receiver was working to get possession of all Collins's assets before letting the surety know anything about his danger, and in this he succeeded. (R. 238–241.)

Whether the duty to notify the company of any acts of fraud or dishonesty was discharged is, under the evidence, a question for the court? The facts are admitted. It

is true, the receiver swears to a number of dates upon which he discovered the acts of alleged fraud. His testimony has been collated and set forth in our first point. His evidence is perfectly clear, however, that he discovered the acts *within a certain period*. Whether it be January, February, or March that he discovered them, he swears to the period within which he made his discovery. The inquiry is thus reduced to a certainty. The receiver has sworn that by a certain time at the farthest he had knowledge of the acts of fraud or dishonesty which might involve loss. Bloodgood, it is true, testified when he (Bloodgood) discovered them and when he told Pauly, trying to fix the date of the discovery of the acts as late as May. But this avails the plaintiff below nothing, for the receiver having sworn as to when *he* (the receiver) knew, at what later date some one else knew and told the receiver is perfectly immaterial.

In this state of the evidence, the receiver having conclusively admitted that by the end of March, at the farthest, he had knowledge of acts of fraud or dishonesty, which might involve a loss under the bond, and it appearing that these acts were not notified to the company until the 24th of June, 1892, the court was asked to direct a verdict for the defendant; and also to instruct the jury that as to the items of October 13th and 14th, the only ones left in the case, the plaintiff could not recover. But the court refused to do this and exceptions were noted. (R. 173, 176, 197.) The defendant also requested the court to instruct the jury that if they found "that on or before the first day of February, 1892, Mr. Pauly knew of any act of O'Brien which *might* involve a loss to the Surety Company under the bond in suit, then they must find a verdict for the Surety Company." (R. 175.)

Again, that if they found that on or before the first day

of March, 1892, Mr. Pauly knew of any act of O'Brien which might involve a loss to the Surety Company under said bond in suit, then they must find a verdict for the Surety Company. (R. 175.) And a similar instruction was requested, that if on or before the first day of April, etc., and still a similar one for the first day of May, all of which were overruled and exceptions noted. (R. 175, 176, 197.)

Again, just after the charge had been delivered, a juror asked the following question:

"A JUROR. May I ask a question on a point of law? If they found out the fraud on the second day of March and notified them on the 23d day of May, would that be, in law, a notice 'as soon as practicable'?

"The COURT. No. I should charge in reference to that, that that is a question for you to determine. It is a question of fact and not a question of law.

"The JUROR. I misunderstood. I thought it was a question of law.

"Mr. STRONG. I desire an exception to this.

"The COURT. Yes." (R. 192.)

The evidence showed a discovery of acts which might involve loss under the bond *on or before a certain time.* The trial judge was requested to determine whether or not the lapse of time proven was "as soon as practicable." This he refused to do. This was error.

What is "as soon as practicable," like what is a reasonable time, when the facts are admitted or clearly proven is a question of law.

"What is a reasonable time [within which to transfer a note] is a question of law, depending upon all the circumstances of the particular case."

Paine *v.* Central Vermont R.R. Co., 118 U. S. 152, 160.

See also—

Morgan *v.* United States, 113 U. S. 476, 501.
Maher *v.* Harwood, 112 U. S. 354.
Wollensak *v.* Reiter, 115 U. S. 96.
Nunez *v.* Dantel, 19 Wall. 560.
Standard Oil Co. *v.* Van Etten, 107 U. S. 325.
Toland *v.* Sprague, 12 Pet. 300.
Wiggins *v.* Burkam, 10 Wall. 129.

See also the following cases, where it was held that the question whether the abandonment of property to insurers was made in due time is not a question of fact to be left exclusively to the jury, but to be decided by them under the direction of the court.

Livingston *v.* Md. Ins. Co., 7 Cranch, 506.
Chesapeake Ins. Co. *v.* Stark, 6 Cranch, 268.
Md. Ins. Co. *v.* Ruden, *id.* 338.

The trial court was asked to decide this question or to leave it to the jury under proper instructions. It refused. This was error.

Thorwegan *v.* King, 111 U. S. 549.
Richardson *v.* Boston, 19 How. 263.
C. & O. Canal Co. *v.* Knapp, 9 Pet. 541.
Hogan *v.* Page, 2 Wall. 605.

POINT III.

THE CLAIM, OR PROOF OF LOSS, WHICH WAS MAILED TO THE COMPANY JUNE 24, 1892, AND RECEIVED JULY 1, 1892, WAS NOT SERVED AS SOON AS PRACTICABLE AFTER THE DISCOVERY OF A LOSS FOR WHICH THE COMPANY WAS RESPONSIBLE.

The bond provides that the company will pay, within three months after notice, accompanied by proof of loss.

(R. 12.) The proof was to be a written statement of the loss, certified, etc., and was to be furnished "as soon as practicable after the discovery" of the loss. (R. 13.)

The evidence on this point has already been set out under our first and second points. It is only necessary here to refer to it.

The evidence there set out shows that the receiver discovered the losses within a certain period—that is, by a certain time—the end of March at the farthest, and the evidence also shows that he delayed sending his proof of claim until June 24, 1892.

The testimony showing when the losses were discovered and the contract requiring a proof of loss as soon as practicable after the discovery of loss, the defendant moved the court for the direction of a verdict, upon the ground, among others, that the plaintiff had not shown that a proof of loss had been made as soon as practicable after the discovery of the loss. (R. 173, 132.) But the motion was denied, and an exception noted. (R. 133.) The defendant requested the court to instruct that "If the jury find, upon the evidence, that on or before the first day of March, 1892, Mr. Pauly knew of any of the various losses for which he now seeks to recover, then they must find a verdict for the Surety Company." (R. 176.)

And it also requested the court to instruct that "if the jury find upon the evidence that on or before the first day of April, 1892, Mr. Pauly knew of the various losses for which he now seeks to recover, then they must find a verdict for the Surety Company" (R. 176); and also that "if the jury find upon the evidence that on or before the first day of May, 1892, Mr. Pauly knew of any of the various losses for which he now seeks to recover, then they must find a verdict for the Surety Company." (R. 176.) But the court refused to grant these prayers and exceptions were noted. (R. 197.)

The court, as in our last point, was asked either to pass upon what was, as soon as practicable, or leave that question to the jury under proper instructions. It refused to do either. It did, in fact, instruct the jury that the proof of loss was to be sent to the company as soon as practicable after discovery of loss, but it was left to the jury to say, totally without restriction, what they thought "as soon as practicable." Moreover, the court went further than this; it instructed the jury that in making up their minds in this unlimited manner of what was "as soon as practicable," they might deduct the time the receiver spent in consultation with the United States attorney and the criminal authorities. (R. 191.) In other words, what was "as soon as practicable," would, first, depend upon the unrestricted judgment of the jury, and, secondly, upon the engagements of Pauly with the United States (and his own) (R. 167) attorney.

POINT IV.

THE BOND WAS OBTAINED BY FRAUD. THE MISREPRESENTATIONS AND CONCEALMENT OF COLLINS, THE PRESIDENT AND MANAGER OF THE BANK, RENDERED THE CONTRACT VOID.

The court erred in charging the jury: "It is said that this bond of indemnity was obtained upon an application which was certified to by the bank itself, and that, in the application, facts were misrepresented and facts were concealed with fraudulent intent on the part of the bank, therefore, that the bond is void. * * * The only knowledge of any facts which ought to have been communicated or were misrepresented—the only knowledge which the bank possessed at the time that application

was made—was the knowledge of Collins himself. Ordinarily, a corporation, like any other principal, is chargeable with the knowledge of any facts which are known to its agents; but, in this case, all these transactions, if there were any transactions, of a fraudulent and dishonest character on the part of the cashier, were transactions for the benefit of Collins, and he was a participator in the fraud, and, under those circumstances, the law does not infer that the agent or the officer will communicate the fact to its principal, the corporation, and, under such circumstances, the corporation is not bound by his knowledge, so this defense melts away and there is nothing of it whatever." (R. 192, 193; exception R. 196.)

At the close of the evidence, a motion was made to dismiss the complaint, or direct a verdict in defendant's favor. (R. 173.) It was based upon the ground (among others) of misrepresentation in the application for the bond—misrepresentation by O'Brien and by Collins, *and misrepresentation by the bank itself acting through Collins.* (R. 173).

There were concealment and misrepresentation as to material facts. A few words of explanation will be needed to make the situation clear.

The sole charge at the trial against O'Brien, it will be remembered, is complicity in frauds of Collins. It asserts that to aid Collins in stealing moneys of the bank, O'Brien allowed him to be credited personally with large sums of money, to which he was not entitled, and then to draw these moneys out. These are the false entries spoken of in the complaint and bill of particulars. In support of this charge, plaintiff introduced Collins's account from the ledger, and then undertook to prove that many of the credits therein were given to him, when they should have been given to the bank. This was also

necessary, in order to prove any loss at all. For by the ledger account itself Collins still had a balance to his credit when the bank closed its doors. (R. 53.) The theory of the plaintiff was to strike out of the account a number of its credits, thus leaving it overdrawn. The propriety of thus attacking the account will be submitted to the court under another point. Here we shall assume, for argument's sake, that it was proper, and to proceed to inquire what effect it had upon our affirmative defences of concealment and misrepresentation. It is not necessary to refer to details of the testimony. Substantially, the one purpose for which plaintiff's witnesses were called, as the entire record reveals, was to show that at different times, during the period covered by Collins's ledger account, entries were made, fraudulently crediting to Collins moneys that should have been credited to the bank. Many of these alleged "false credits" were prior to the date of the bond sued on—July 1, 1891. (R. 11.) There is absolutely no difference between the character of the transactions charged against Collins and O'Brien before and after that date. If any were "fraudulent and dishonest," all were. What was done after the defendant became surety was precisely the same as that done before. But *nothing was said* to the surety of all this, and it was *absolutely ignorant* of it. (R. 171.) Still further, *a written statement* was made to the surety, as to O'Brien, *before it consented to become his surety*. It consisted of two parts —one made by O'Brien himself, and the other *by the bank as his employer*. In the first, O'Brien states that he has never been in arrears or default in his present employment; that his accounts were last examined by the bank examiner, and that they were found correct. (R. 318.) In the second, Collins, *acting for the employer*, and *signing as president of the bank*, states that O'Brien had always

performed his duties in a faithful and satisfactory manner; that on March 28, 1891, his accounts were examined and found correct in every respect; that he was not in arrears or default, and that nothing was known affecting his title to confidence, and no reason why the bond for his fidelity should not be issued. (R. 321.)

All this was said of one who, according to the receiver, (and for the purposes of the point now presented, his charge must, as against himself, be taken to be true), had been guilty of continuous frauds, involving the repeated falsification of the very accounts which the surety was assured were "correct in every respect." It was said by the very one to whom the surety was forced to apply for the desired information; who was, by all other officers of the bank, left in sole control of its affairs; and who was, therefore, the proper and, indeed, only person from whom such information would, or could, come. If the statements were false, no one knew this better than Collins. And yet it is said that his statements were not those of the bank, and his knowledge was not its knowledge. Nothing that he knew can be imputed to it, and for nothing that he said can it be held responsible. The reason given is that all these alleged frauds were for his sole benefit, and he, therefore, does not represent the bank in this concealment and misrepresentation. Let us see what this involves. Here is a bank whose directors leave its entire management in Collins's hands. He "runs the bank." (R. 157, 159, 160, 161.) He determines to obtain a bond for the fidelity of O'Brien, the cashier. According to the receiver's theory, a series of frauds has been going on for seven or eight months, in which O'Brien is his tool, but from which only Collins derives benefit. These frauds are concealed from the surety, and are continued in precisely the same way after the giving of the

bond. Of course, Collins knows all about them when the bond is applied for and received.

Upon these facts how can it be claimed that the bank is not affected by his knowledge, his concealment, and his misrepresentations? There seems to us to be no basis for such a claim. It is idle to stop to cite authorities, holding that a contract procured by fraud cannot be enforced by the guilty party himself. That proposition will not be disputed, even by the defendant in error. His claim is that the *party* here was *not* guilty of the fraud. He wishes to divorce the bank from any connection with, or responsibility for, Collins in this transaction. This, of course, raises a different question, upon which it may, at the outset, be said to be the general rule that any principal, however innocent, is responsible for his agent's fraud in a transaction on the principal's behalf and for his benefit.

This rule has been applied in the case of a surety's contract to relieve the surety.

Drabek *v.* Grand Lodge, 24 Ill. App. 82, 89.
Franklin Bank *v.* Cooper, 36 Me. 179, 196.
Graves *v.* Lebanon Bk., 10 Bush (Ky.) 23, 29.

The question may come up in two ways. Sometimes the principal is the defendant and is sued by the defrauded party. In such cases it is held that he cannot, while retaining the very benefit secured by the agent's fraud, escape responsibility for this, however innocent he himself may be.

Veazie *v.* Williams, 8 How. U. S. 134, 157.
Bennett *v.* Judson, 21 N. Y. 238.
Nat'l Ins. Co. *v.* Minch, 53 N. Y. 144, 149.
Holden *v.* Erie Bank, 72 N. Y. 286.

Sometimes he is the plaintiff, and the defence rests upon the fraud of his agent. Here it has been declared to be a rule, without exception, that he cannot undertake to *enforce the contract* without becoming responsible for all the instrumentalities by which it was obtained.

Elwell *v.* Chamberlin, 31 N. Y. 611, 619.

Is not the case at bar directly within these authorities? It would seem so. But the receiver says that in this transaction Collins was not the agent of the bank, because Collins was robbing the bank. Neither the assertion, nor the reason given for it, will stand examination.

If Collins were not the agent of the bank in this transaction, then it, a corporation, which can only speak and act by agents, appeared and acted in the transaction without *any* agent. There are three parties to the bond—the surety, the employee, O'Brien, and the employer, the bank. (R. 12.) There could not be any such bond without these three parties. Nor could the bond be obtained without an application of the employee, fortified by the employer's certificate. All these things we find in *form*. And we now have this receiver insisting that there was a bond in *fact*, valid in *law*, and enforceable for $15,000. He wants the bond, and merely seeks to ignore the employer's certificate by which it was secured. In one word, he asks to enjoy the benefit of the contract, and to repudiate the means by which it came into existence, even though this compel him, as we have seen, to assert that *no one represented the bank* in this transaction. Nor does the reason assigned by him help matters any. Suppose Collins to have been guilty of all the misconduct charged. Is that any reason why a surety should be deceived into becoming such? It is not a mere question of imputing to a principal an agent's knowledge. Even there nothing

more has ever been held, so far as we can discover, than that the other party to the transaction, colluding with the agent, cannot escape the consequences by imputing the agent's knowledge to the principal; or again, that where the fraudulent agent is himself a party to the transaction, it will not be held that he also represented the principal in it, so as to charge the latter with the consequences of his knowledge. Even this latter proposition does not carry universal assent, where, in fact, he *does* act also for the principal.

Holden *v.* Erie Bank (*supra*).

But in the case at bar we have no such state of facts. Collins did not even pretend to act in this transaction for himself. The surety had not only no means of knowing, but no cause to suspect, that he had any personal interest in the matter. He assumed to act for the bank, and for it alone, and in *form*; *i. e.*, upon the face of the transaction, he did act for it alone. By so acting, he procured from the surety the obligation now sued on. And the receiver's proposition is that because, unknown to the surety, Collins was engaged in a course of fraud and robbery of the bank, the latter is entitled to the benefit of the obligation so obtained. In a word, his position is this: Collins and O'Brien are principal and accomplice in robbing the bank. Apprehending naturally that some day or other all may come out, they magnanimously determine to cast an anchor to windward for the bank, and enable it to shift the loss upon some one else. So they get the bond in suit, regardless of any fraud that may be incidentally necessary. And now, the receiver says, their plan has succeeded. The bank may *enforce this bond*, and the surety must suffer the consequences of his misfortune in not divining the fraud and declining to give the bond.

To put it in a nutshell, he asserts that Collins, professing to represent the bank, representing no one else, much less himself, in the transaction, may secure this bond by fraud, and that the bank may then ratify his act in obtaining the bond, and may enforce the bond, while repudiating or disclaiming the fraud.

We have seen no case remotely sustaining that proposition. Cases holding that the innocent obligee may enforce the surety's obligation, despite any and all fraud committed by the surety's principal upon him, have no bearing whatever. In such cases the plaintiff has not committed any fraud himself, nor is there any approach to an agency between him and the person who did commit it. They furnish, therefore, no analogy, much less authority, for the case at bar.

POINT V.

THE CLAIM OF LOSS WAS NOT GIVEN TO THE SURETY COMPANY WITHIN THE LIMIT OF TIME PROVIDED.

By the contract the company agrees to pay three months after notice accompanied by satisfactory proof of loss has been given. (R. 12.) This notice "shall be in writing, addressed to the company, as aforesaid, *as soon as practicable* after the discovery of any loss for which the company is responsible, and *within six months* after the expiration or cancellation of this bond as aforesaid." (R. 13.)

The bond expired by its limitation of one year and also by the "death, dismissal, or retirement of the employee from the service of the employer;" and, within six months thereafter, the claim of loss was required to be made.

The bank suspended on the 12th of November, 1891. The receiver was appointed on the 18th of December and qualified and took possession on the 29th of that month. O'Brien ceased to act as cashier on the 12th of November, 1891. He was, however, employed by the receiver, in what capacity does not appear, but there is no pretence that he continued in the service of the bank (the employer). On the 2d of March, 1892, O'Brien "left." (R. 107.) He did not "voluntarily resign," as stated by the Court of Appeals. (R. 320.) The claim of loss accompanied by proofs, dated the 24th of June, 1892, was not received by the company until the 1st of July, 1892. (R. 190.) The trial court properly distinguishes between the letter of the 23d of May, 1892, and a claim, and concedes that the letter did not constitute a claim as required by the contract. (R. 190, 191.) Thus it plainly appears that more than six months elapsed before claim was made. The trial court, after this concession charged:

"Now, if it is a fact that the plaintiff was engaged more or less in consultation with the United States district attorney and with the criminal authorities, and that his circumstances and situation were such that it could not be reasonably expected of him that he should make out this formal claim and send it before the time when he did so, then you can find the notice *was given within a reasonable time and in compliance with the condition of the policy.*"

And the court adds:

"This condition, like the other, affords a legitimate defense, even though you should think it *an unconscionable defense.* It is a legitimate defense, because it was one of the things agreed to on behalf of the bank, which was secured by the bond." (R. 190, 191.)

This was surely "scant courtesy" to a party whose of-

fence consisted solely in seeking to be bound by its obligation as made and not some other obligation.

Of the same tenor was the charge in respect of the other notice already discussed, the court charging:

"Now, gentlemen, if this notice was not given conformably to the condition of the bond, the plaintiff is not entitled to recover, however *unmeritorious this position may be* in point of morals on the part of the defendant." (R. 191.)

The part of the charge first quoted was excepted to. (R. 196.)

It needs no argument to show that the limit of time fixed by contract could not be extended save by mutual consent, especially in the case of a surety, nor that if it could the evidence afforded any pretext for the jury to absolve the receiver from the contract. All the evidence is in the bill of exceptions. (R. 281.)

This ruling of the trial court was not acted on by the Court of Appeals, but, *sub silentio*, that court, however, held the company bound upon the ground that the contract was for the fidelity of O'Brien "in connection with the duties of the office or position hereinafter referred to, or the duties to which *in the employer's service* he may be subsequently appointed," and that as he continued for several months in the service of the receiver, he was thereby discharging duties to which, *in the employer's service*, he was subsequently appointed. (R. 329.) This ruling raises a very serious question.

O'Brien ceased to act as cashier on the 12th of November, 1891. (R. 34.) On the receiver taking possession on the 29th of December, 1891, all the officers and employees of the bank were dispossessed. (R. 139.) The receiver was asked:

"Q. What did you do towards preventing the officers or employees of the bank from acting any further in their respective capacities?

"A. They were not permitted to act any further in their respective capacities; they were dispossessed; I had charge of the California National Bank affairs, and I do not know what I can specifically allude to as preventing them, except that I was in possession and kept them from having possession.

"Q. And what day was it when you took possession?

"A. On the 29th of December, 1891." (R. 139.)

Again he is asked:

"Q. After you took charge, did you continue any of the officers of the bank or its employees in your employ?

"A. For a short time, George O'Brien." (R. 139.)

There is not a particle of evidence to show what the duties of O'Brien were in the employ of the receiver, or how far they were similar to any duties which in the service of the bank he might have been appointed to discharge. They might have been wholly different in kind, and have involved different responsibilities from any for the discharge of which he could have been appointed by the bank. If, as seems must be the case, the character of duties under the employment by the receiver enters as an element in the proposition of the Court of Appeals, the question is one of fact, not tried or found by the trial court, but simply assumed by the Court of Appeals to the detriment of the company.

But to come to the main question. Was the company, the surety, responsible for misconduct on the part of O'Brien in the employ of the receiver? If not, the contract of suretyship had expired. It is said by the court he was not dismissed, nor did he retire on the 12th of November. Perhaps not on that day, but when the

receiver took possession of the suspended bank and dispossessed the officers and employees, there was dismissal and retirement in the strictest sense of those words. Besides, the contract means substantially the termination of the relation of master and servant, of which death, dismissal, and retirement are examples.

Could the officers and employees have sued for and recovered their salaries for any period after dispossession? The court further says, "the bank did not cease to exist when the bank examiner took charge of its affairs on November 12, nor when the receiver qualified and took possession." If this be conceded, still the bank had no functions, and hence no service for such exercise. All persons employed by the receiver were in his service, contracted with and paid by him, and for whom he was responsible, and their employment by him no more made them the servants of the bank than of the creditors or stockholders. Certainly the question whether the relation of O'Brien as employee of the bank terminated was one of fact to be tried by the jury. The burden of proof was upon the receiver.

The powers and duties of the receiver as declared by law (R. S., U. S., § 5234) necessarily included the power to employ clerks and other servants

Again, the contract evidently contemplates that the appointment of O'Brien to other duties than those of cashier shall be made by the bank, and not otherwise. Not only were the other duties to be "in the service of the employer," but the appointment to discharge such duties was to be made by the employer. A construction is not to be put upon a contract of guaranty beyond the contemplation of parties and its plain terms. Here is a contract by which the duty of the guarantor was expressly made upon the condition of other correlative duties to be performed by

the employer and involving judgment and discretion. *Non constat* that a guarantor would be willing to accept the judgment and discretion of any party other than the bank. Certainly the terms of the contract indicate no such willingness, but are confined strictly to the employer.

In the case of Barker *v.* Parker, 7 D. & E. 287, the condition of a bond was that a clerk should serve faithfully and account for all moneys to the obligee and *his executors.* After the death of the obligee, the business was carried on by the executors. Lord Mansfield held that the surety was not liable for moneys received after the death of the obligee, although he was continued in the same employment by the obligee's executors. *No service except to the obligee was contemplated, although it might have been necessary to account to his executors.*

See also 2 Brandt on Suretyship and Guaranty, 2d ed., § 119.

POINT VI.

THE BUSINESS ENGAGEMENTS OF THE RECEIVER COULD NOT JUSTIFY DELAY IN SERVING THE NOTICE OF CLAIM, AND THE CHARGE OF THE COURT ON THIS POINT WAS ERROR.

The court charged the jury: "Now this notice (of claim) was given, the only way it could be given practically, by mail on the 24th of June, and received by the defendant on the 1st of July. Now, if it is a fact that the plaintiff was engaged more or less in consultation with the United States attorney, and with the criminal authorities, and that his circumstances and situation were such that it

could not be reasonably expected of him that he should make out this formal claim and send it before the time when he did so, then you can find the notice was given within a reasonable time and in compliance with the condition of the policy." (R. 190, 191 ; exception R. 197.)

The plaintiff testifies that it may have been two months after he became aware that there were irregularities in Collins's account, and that the bank had suffered loss from his defalcation, before he made it known to the company ; that he waited two months because of the extensive business he had on hand, and the many matters that were calling for attention every day ; that he had to carry on consultations concerning these losses with his attorney ; and that he had to consult with the United States attorney at Los Angeles, requiring visits in person, besides correspondence. (R. 138.) (The receiver evidently refers, when he speaks of the delay of two months, to the letter of May 23d. As a matter of fact he delayed until the 24th of June.)

Suppose the receiver discovered the loss for which the company was responsible in January and sent the notice of claim in June, no one would contend that under ordinary circumstances, the notice was sent, as soon as practicable, after the discovery of the loss. *But*, says the court, if his engagements, circumstances, and situation were such that it could not be reasonably expected of him to make out the notice and send it before June, then the jury can find that the notice was given in compliance with the bond.

The company was entitled to receive the notice as soon as practicable after the loss. The engagements, circumstances, and situation of the receiver could not extend the time for a single day. Under the charge the receiver could have delayed serving the notice for an indefinite

period, *provided* his engagements, situation, and circumstances were such that it could not be reasonably expected of him to serve it sooner. This was clearly error.

POINT VII.

Errors Were Committed in the Admission of Evidence.

We cannot undertake to argue in detail the questions of evidence presented by the record. There are, indeed, but few that space will permit us even to notice:

1. The admission in evidence of Collins's ledger account, and of the teller's book, as it was called.

2. The admission of evidence as to alleged prior frauds.

3. The admission of evidence claimed to show the extent of Collins's indebtedness to the bank.

These errors are so fundamental, and, as it seems to us, so plain, that we call especial attention to them:

1. *The ledger account and the teller's book.*

Keeping in mind the theory of plaintiff's case, that O'Brien permitted fraudulent *credits* in Collins's account, and then permitted him to draw out the moneys, we ask how *the entire account* could be competent evidence against this surety.

It certainly could not of itself be evidence of anything. It does not prove itself. It is but a series of declarations by which the surety cannot be affected, much less bound. It would not be evidence even against O'Brien.

Rudd *v.* Robinson, 126 N. Y. 117.

Smith *v.* Rentz, 131 N. Y. 175–6.

And it could not be evidence against the surety, even if all the entries had been in O'Brien's own handwriting. It would then be simply his admissions, not binding on his surety.

Hatch *v.* Elkins, 65 N. Y. 489.

Roe *v.* Beach, 76 N. Y. 168.

If not evidence, in and of itself, it never was made evidence by any further testimony. The rule requires entries to be proved by the person making them and having personal knowledge of the facts asserted by them. No rule is better settled than this; but no such testimony was given. The only witness put on the stand as to the ledger account testified that he had no personal knowledge of the transactions represented by the entries, and did not even make all the entries. But, in spite of our objections, he was allowed to read from the account as much as plaintiff desired (R. 51), and this account was *the only evidence* that Collins *ever drew out anything*. We submit that it was wholly insufficient.

The same considerations apply to the teller's book. (R. 59–61.)

Admitting, however, that the books were evidence as against the Surety Company, if properly proved, the testimony was to the effect that the books did not contain a true account of the transactions of Collins with the bank. Brimhall, the bookkeeper, testified that the account of Collins was used as a "clearing house" (R. 68); that his account was used for many transactions of the bank in which he had no interest (R. 69); that his account contained items not properly chargeable against him (R. 69); that his account was used for the purpose of getting a transaction off the books which had been placed there

for the convenience of the bank (R. 69); that there were transactions in Collins's name for the benefit of the bank (R. 70); that to pass things into his account and out of his account that were really for the interest of the bank, and not Collins's, was an every-day transaction. (R. 68.)

Not only this, but after the suspension certain additional items were entered in the account. (R. 51–166.)

Indeed, in the plaintiff's own case the account must have been discredited, for the account shows (R. 281) and the bookkeeper testified (R. 51) that at the suspension of the bank Collins had a credit of $11,420.90. It is only on the theory of Collins' indebtedness to the bank that it is made to appear that Collins drew out the $45,000 improperly placed to his credit. Moreover, if we take the two bonds together, one in this case for $15,000 and one in the Collins case, No. 169, for $25,000, making $40,000 in all, and deduct from the alleged loss, $45,000, the credit in favor of Collins for $11,420.90, we have as a result $33,679.10, while the plaintiff sued for and recovered a judgment for the full amount of both bonds. It was only by discrediting the account that the plaintiff maintained his case. That is why he notified the company that Collins' account was overdrawn to the extent of $374,978.22. (R. 238, 247, 275.)

2. *Evidence as to alleged prior frauds.*

Mention has been already made that plaintiff was allowed to prove alleged frauds prior to the date of our bond. There were many instances of this, one or two examples of which will be sufficient. On March 25, 1891, the Park Bank of New York loaned $25,000; and on June 10, 1891, $20,000 to the California Bank. (R. 75–77.) These sums, it is claimed, were by deposit tags credited to Collins. (R. 74, 213.) Even conceding that, for ar-

gument's sake, how could it properly affect the surety? Our bond was not given until July 1, 1891. (R. 11.) The urgency for it all is apparent. By the books of the bank—this very ledger account—Collins still had $11,420.90 to his credit when the bank closed its doors. To make out his case it was necessary for the receiver to strike out some of the credits, thus impeaching the account, and at the same time to insist that *the entries on the other side* were *per se* evidence, even against the surety, of Collins having drawn out money.

Now, we submit that all this was error. If these items are *not* necessary in proving that *during the life of our bond* Collins was allowed to draw out more money than was his right, then, however fraudulent it may have been, it was improper to admit it to our prejudice with the jury.

If they *were* necessary to the establishment of any loss, then the loss was one for which the surety was not liable. We did not undertake to answer for O'Brien's acts done before the bond was given.

Still further, even if we could in any way be *liable* under the bond for these alleged prior frauds, then we were *entitled*, under the bond, *to have them specified in the proof of loss*. This was not done. All these objections were taken (R. 74, 75, 76), and the admission of the evidence was, we submit, error.

3. *The extent of Collins's indebtedness to the bank.*

The error in this was twofold.

(*a*) Its amount had no legitimate bearing on the case.

The surety was only liable for "fraud and dishonesty," not for "indebtedness." The charge was "false entries," and improper certificates of deposit. If, on any particular day, Collins gave value to the bank, he was *entitled* to a

credit to that amount or to a certificate of deposit, as he might elect, *no matter how much he then owed the bank.* The bank could not take his money save on his own terms. The only question, then, under the proof of loss, the complaint, or the bill of particulars, was whether he did or did not give value in the case of the particular items on which a recovery was sought. His general indebtedness had nothing legitimately to do with that inquiry. Yet it was put to the jury as having *great importance.* (R. 64–65, 184), and had great effect on their minds. (R. 194.)

Still further, it nowhere appears that *O'Brien* had anything to do with the creation of this indebtedness. We do not now speak of any charge of "false credits," &c., but merely of the alleged general indebtedness of Collins to the bank. On the contrary, as already seen, O'Brien had in reality no power or control as to the bank's affairs. When the directors leave Collins to "run the bank," from first to last, during his connection with it in any capacity, and, on his elevation to the presidency, put in as cashier a former stenographer and collection clerk, understanding, as they all say, that he was still to be merely a "clerk" to Collins, how can "the general state" (R. 65) of Collins's indebtedness to the bank be evidence legitimately proving "fraud and dishonesty" on O'Brien's part; *a fortiori* how can it legitimately bear on the question whether O'Brien gave *certain credits* and issued *certain certificates of deposit* without the bank's receiving any value for them?

(*b*) There was no competent evidence showing how much Collins did owe the bank, and incompetent evidence on that subject was admitted. The receiver claimed to have sent to the surety a certain account showing the true

condition of affairs between Collins and the bank. It was at last received in evidence. (R. 128, 247–275.) It makes out Collins a debtor in $374,978.22. This was what the juror had in mind. (R. 194.) There was a great struggle over its admission, the surety insisting that there was no proof of its having ever been sent to him. But conceding, for argument's sake, that this was proved, what of it? How did sending it to the surety make it competent evidence against the latter, that Collins owed the bank $374,978.22? The receiver relied on a phrase in the bond as to "*prima facie* evidence." (R. 13.) That clearly refers to a prior part of the bond, which says that the notice must be accompanied by "satisfactory proof of a loss, as hereinafter mentioned." (R. 12.) The bond, therefore, proceeds, later on, as promised, to say in what form this *preliminary* proof must be. The parties are not speaking of a possible subsequent trial of an action. No such contingency is in their minds.

Moreover, the statement which is to be "*prima facie* evidence" is a statement of the "loss," for which claim is made. It is not pretended that the receiver could, or ever did, claim $374,978.22 under the bond. This is a statement of Collins's alleged aggregate indebtedness to the bank, and not of the "loss" claimed from the surety. How, then, can it be evidence against the latter?

Lastly, the statement must be "based upon the accounts of the employer" (R. 12), and that cannot be said of the statements received in evidence. Allen, the United States district attorney; Sparks, the expert, and Bloodgood, his assistant, investigated Collins's transactions, then took his account on the books and remodelled it to suit their own notions of what it should be. Collins was dead at the time (R. 168), and no one, so far as appears, represented his interests. It was a purely *ex parte* proceeding, in

which the three actors assumed what "facts" they pleased (R. 166), and rendered what judgment they saw fit. (R. 166.) Specimens of the way the work was done appear in the record. (R. 167, 169.) The latter of these two items was not claimed from the surety; the former was and was thrown out by the court, despite the learned and lucid reasoning of the California U. S. district attorney, on which this committee of three acted.

Surely it is idle to stop to argue that this remarkable document was not evidence against the surety, that Collins owed the bank $374,978.22, even if—which we have already disputed—that fact, legitimately proved, would have been competent. The surety did not agree that a statement of such composite parentage—not merely not "based" upon the employer's account, but assuming upon outside investigations to impeach them—should be evidence of anything against him.

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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